IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 442.

SCHWEGMANN BROTHERS, ET AL., *Petitioners,*

v.

CALVERT DISTILLERS CORPORATION.

and

No. 443.

SCHWEGMANN BROTHERS, ET AL., *Petitioners,*

v.

SEAGRAM-DISTILLERS CORPORATION.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICI CURIAE

For American Booksellers Association, Inc., American Fair Trade Council, Caron Corporation, Chanel Incorporated, Charles of the Ritz, Inc., Colgate Palmolive Peet, Inc., Coty Incorporated, Evyan Incorporated, F. W. Fitch, Inc., Fountain Pen & Mechanical Pencil Manufacturers Association, Inc., Guerlain Incorporated, Helena Rubenstein, Inc., Houbigant, Inc., Jean Patou, Inc., John H. Woodbury, Inc., Lehn & Fink Products Corp., Lucien LeLong, Inc., National Association of Bedding Manufacturers, National Federation of Independent Business, Inc., Max Factor & Co., Northam Warren, Inc., Pond's Inc., Revlon Products Corporation, Richard Hudnut, Inc., The R. L. Watkins Co. Division, Wildroot Co., Inc., Yardley's of London, Inc.

HERBERT A. BERGSON,
Counsel for Amici Curiae.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit (R. 96 to 106) is reported at 184 F. 2d 11.

JURISDICTION.

The judgments of the Court of Appeals were entered on July 27, 1950 (R. 96, 102). A petition for rehearing was denied on September 15, 1950 (R. 115, 122). The petition for writs of certiorari was filed on December 8, 1950, and granted on February 26, 1951. The jurisdiction of the Court rests on 28 U.S.C. 1254.

QUESTION PRESENTED.

Whether the Miller-Tydings Amendment which exempts from Section 1 of the Sherman Anti-Trust Act minimum resale price "contracts or agreements," applies equally to all who by State law are bound to observe the terms of such agreements whether or not they are signers.

STATUTES INVOLVED.

The pertinent statutes are the Sherman Anti-Trust Act (Act of July 2, 1890, Ch. 647, Sec. 1, 26 Stat. 209, 15 U. S. C. Sec. 1) as amended by the Miller-Tydings Amendment (Act of August 17, 1937, c. 690, Title VIII, 50 Stat. 693, 15 U. S. C. Sec. 1) and the Louisiana Fair Trade Act (La. Act 13 of 1936; La. R. S. 51: 391-396).

INTEREST OF AMICI CURIAE.

In view of the large number of *amici curiae*, it is impracticable to describe in detail the individual interest of each. They consist of trade associations whose members utilize minimum resale price agreements extensively in their merchandising procedures and individual companies which similarly use such agreements. The associations and companies represent an important segment of the American economy, and an adverse decision in this case would vitally effect their merchandising practices.

STATEMENT.

Respondents, Calvert Distillers Corporation, a Maryland corporation, and Seagram-Distillers Corporation, a Delaware corporation, each brought suit against the petitioners who operate a supermarket in New Orleans, Louisiana, to enjoin them from selling Calvert and Seagram products for less than the minimum resale price specified in fair trade contracts entered into between the respondents and certain Louisiana retailers. The suits, which have been combined for purposes of appeal, were predicated on the Louisiana Fair Trade Act, Section 2 of which provides in substance that a person with notice of a minimum resale price contract is bound by its terms. Petitioners contend that this provision of the Fair Trade Act is inapplicable to transactions in interstate commerce because it conflicts with the terms of the Sherman Anti-Trust Act despite the exemptions provided in the Miller-Tydings Amendment. Both Courts below held that the Miller-Tydings Amendment exempted interstate transactions under Section 2 of the Louisiana Fair Trade Act from the prohibitions of the Sherman Act.

SUMMARY OF ARGUMENT.

The legislative history of the Miller-Tydings Amendment conclusively demonstrates that Congress gave specific consideration to the applicability of the Amendment to transactions involving non-signers and that Congress intended the Amendment to apply to such transactions. With a clarity rarely found in the history of controversial legislation, the reports of both houses of Congress, the hearings before the committee and the debates express the legislative design to include the non-signer provisions within the scope of the Miller-Tydings Amendment. Both the proponents and the opponents of the Amendment revealed their understanding that it encompassed the non-signer provisions; and, indeed, a principal cause of the vigorous

opposition to the amendment was its avowed applicability to transactions involving non-signers. So clear is the legislative history that the adoption of the interpretation proposed by the petitioners would constitute a disregard of the intention of Congress. The Amendment is to be construed to effectuate, not nullify, that intention irrespective of the wisdom of the legislative policy or its economic implications. Resort to legislative history is always appropriate for the purpose of determining the intention of Congress and the "plain meaning rule" must give way when its application would defeat the legislative purpose. The language here, even when literally construed, is entirely consistent with respondents' interpretation of the Amendment. Although the subject matter of the Amendment is the minimum resale price "contract" or "agreement," the language does not purport to limit its application to those who actually sign minimum resale price agreements, nor does it purport to be inapplicable to those who become bound by such agreements merely by notice thereof. Regardless of whether a contractual relationship technically exists in the case of a non-signer, the premise upon which the Congress acted in passing the legislation was that non-signers were bound to a minimum resale price contract of which they had notice to the same extent as the signers; and it is significant that every time Congress referred to the liability of non-signers that liability was cast in terms of an obligation under the contract.

ARGUMENT.

The Legislative History of the Miller-Tydings Amendment and Its Terms When Considered in Their Historical Context Compel the Conclusion That the Miller-Tydings Amendment Validates the Non-Signer Provisions of the State Fair Trade Acts in the Field of Interstate Commerce.

Fundamentally, the question is whether the Court will permit the judicial process to be utilized as a vehicle for the virtual repeal of the Miller-Tydings Amendment on the basis of an asserted adherence to the doctrine of literal statutory construction. For the petitioners correctly suggest here, as they explicitly urged on the court below in their plea for reversal, the fact that a decision in their favor "will cripple, if it will not kill the Miller-Tydings Act" as "the great and inescapable extra-legal effect overshadowing the narrow legal issues" involved in the case (Br. C. A. p. 6). The legislative history so conclusively demonstrates that Congress intended the Amendment to validate the non-signer provisions of the various state fair trade acts in their application to inter-state commerce that the adoption of a contrary conclusion would frustrate the obvious purpose of Congress. Regardless of the wisdom of the legislative policy, it is respectfully submitted that the Court should reject the invitation of the petitioners to cripple if not kill the Amendment by judicial interpretation.

Significantly the only other cases decided on this question unqualifiedly support respondents' position. *Calmia* v. *Goldsmith Bros., Inc.*, 299 N. Y. 636. *Pepsodent Co.* v. *Krauss Co.*, 56 F. Supp. 922.

1. An analysis of the entire legislative history of the Miller-Tydings Amendment reveals with a certainty rarely found in the history of such a controversial bill that:

(a) The principal issue in Congress was whether the Federal government or the individual States should

determine the policy with respect to resale price maintenance; and that, in enacting this legislation, it was the avowed intent of Congress to remove every obstacle created by the Federal anti-trust laws to the complete operation of State fair trade acts, so that there would be a single policy relating to resale price maintenance within the State;

(b) The Congress specifically considered the applicability of the Amendment to transactions involving parties who had not actually signed minimum resale price agreements; and

(c) The Congress understood and intended the Amendment to apply to so-called "non-signers" with notice.

Turning first to the history in the House (H. Rept. No. 382, 75th Cong. 1st Sess. p. 2),[1] the Committee to which H. R. 1611 was referred stated that the sole objective of the proposed legislation was "to permit the public policy of States having 'fair trade acts' to operate with respect to interstate contracts for the resale of goods within those States." That policy was described by the Committee in the following language (Ibid. 2):

> "State fair trade acts typically provide, first, that contracts may lawfully be made which provide for maintenance by contract of resale prices of branded or trade-marked competitive goods. *Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.*"[2]

[1] The Reports referred to in this Brief are the Conference Report on H.R. 7472 (75th Cong.) and the Reports on H.R. 1611 (75th Cong.) introduced by Mr. Miller and S. 100 (75th Cong.) introduced by Senator Tydings, the texts of which were practically identical. Neither of the latter two bills was enacted as such but the provisions of the Miller-Tydings Bills were added as Title VIII of H.R. 7472, entitled "A Bill to provide additional revenue for the District of Columbia and for other purposes."

[2] Italics supplied except where indicated.

The Committee's desire to facilitate this fair trade policy of the States was explicitly and forcefully expressed (Ibid. 3 and 4):

> "Your committee respectfully submit that sound public policy on the part of the Federal government lies in the direction of lending assistance to the States to effectuate their own policy with regard to their internal affairs. It is submitted that this is especially true where such assistance, as in this instance, consists of removing a handicap resulting from the surrender of the power over interstate commerce by the States to the Federal government."

The purpose to substitute a State for a Federal policy in the field of resale price maintenance is manifested by the section of the Report entitled "Economic Aspects". There, after adverting to the arguments in support of the divergent views on the economic wisdom of resale price maintenance, the Report states (Ibid. 3):

> "However, in the opinion of the committee, those arguments are more properly addressed to the State legislatures considering the enactment of fair trade acts. It is the legislature's responsibility to fix the public policy of the State. This legislation merely seeks to help effectuate a public policy so fixed in a State. It has no application to any State which does not see fit to enact a fair trade act."

It is difficult to conceive of a clearer expression of the legislative understanding and intention that the Miller-Tydings Amendment was to be applicable to the so-called non-signers than that contained in this Report. Moreover, the following comments of Representatives Celler and Ramsay in their "Additional Views" indicate a similar understanding of the Amendment (Ibid. 24):

> "It must be kept in mind that the Supreme Court in upholding two *State laws of the type H. R. 1611 is intended to facilitate*, did not sustain price-fixing as an end. The Supreme Court merely upheld price-fixing

contracts, involving trade-marked articles in open competition; *as binding on all (on notice as to their existence)*, as a means to the end of protecting intangible rights in the trade-marks from destructive selling."

Thus, Representatives Celler and Ramsay in unambiguous terms indicated their understanding that the Miller-Tydings Amendment was intended to facilitate the free operation of the state laws which provided that minimum price resale contracts would be binding on all who had notice.

Not only do the majority and the concurring reports of the House Committee exhibit a clear understanding that the bill should apply to non-signers but, the hearings which took place before the preparation of the report reveal with equal clarity the same understanding on the part of both the proponents and the opponents of the bill. Thus, the representative of the National Association of Retail Druggists, a strong proponent of the bill, testified (Hearings on H. R. 1611, 75th Cong., 1st Sess., p. 3):

> Chairman Sumners. I would like to ask you a question, and that is whether or not concerns that sell trade-marked articles may not, under this bill, make special contracts with special concerns, in which they do not attempt to control their prices, retail prices? *Is there anything in this legislation, or any other legislation, that would require a concern* that is attempting to control prices at which its commodities can be sold by particular individuals *from also obligating all other individuals who buy that commodity to sell at the same price that they require these persons with whom they have contracts to sell?*
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> Mr. Jones. Mr. Chairman, the Supreme Court, in last month, upheld the California and Illinois acts, which revolved around the question of whether or not a non-signer of these minimum-price contracts could be bound; *men who refused to sign the contracts or did not sign the contracts, but who had knowledge of such contracts, knowledge of such minimum contracts, and these State laws required that they observe and not destroy the value of a contract signed in the State, and Supreme Court . . .*

Chairman Sumners. *This legislation is simply seeking to effectuate the State laws, not establish Federal legislation independent in its operation?*

Mr. Jones. Yes. As I said, Mr. Chairman, I am not an attorney . . .

Chairman Sumners. I beg your pardon.

Mr. Jones. I think the next witness will cover that point clearly.

Mr. Miller. *It effectuates the State laws.*[3]

One of the most striking and revealing aspects of the legislative history is that the opponents of the Miller-Tydings Amendment testified against it for the very reason that *it did* apply to non-signers. The testimony of counsel for the National Retail Dry Goods Association is an example of this opposition (Ibid. 171-172):

Mr. Robison. As I understand it, it has been claimed that he makes a price with one fellow, one dealer, and notifies all of the other folks of that kind of contract, and they are bound by it.

Mr. Fox. They are bound. The manufacturer can say to a wholesaler in a State, "I am fixing the price to the retailer and consumer at so much on this thing", and any other wholesaler and retailer in the State must sell to retailer and wholesaler at exactly the same price.

* * *

Mr. Miller. And that question has not been passed on by the Courts?

Mr. Fox. Justice Sutherland's decision is one of the most careless decisions I have read. He says that there is no delegation of power. He says there is no delegation of power by the legislature. Can you think of any greater delegation of power than to give the right to a manufacturer to go into a State, get one wholesaler to agree on the price with him, get one retailer to agree on the price with him, and then everybody else in that State will have to observe that price?

[3] See also the statement of Congressman Wright Patman who discussed the non-signer provisions of the California, Illinois and Louisiana laws, and urged that the States should be permitted to enact such legislation if they so desired (Ibid. 20-21).

> If there is no delegation of power, I would like to know what it is. It is worse than the delegation of governmentally controlled commissions. Justice Sutherland said there was no delegation of power. He could not sustain that in argument in a million years. What they did in the Supreme Court was to say, "Well, if they want it, give it to them." It is the most vicious delegation of power that I know of. *It gives to two individuals the right to fix prices and conditions of resale for all others without the consent or advice of these others.*

Turning now to the consideration of the Amendment in the Senate, the record is equally persuasive as to the understanding and intention of that body. The Senate report specifically reveals a basic purpose to remove the barrier of the Federal anti-trust laws from the free operation of the State fair trade acts and eliminate conflicting economic philosophies with respect to resale price maintenance within a single state (No. 879, 75th Cong., 1st Sess., p. 6):

> The Congress is not called upon to pass upon the effectiveness of the remedy, but it should not put obstacles in the way of efforts of the individual States to make the remedy effective.
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> But most important, from the standpoint of the Congress, the proposed bill merely permits the individual States to function, without Federal restraint, within their proper sphere, and does not commit the Congress to a national policy on the subject matter of the State laws.

The minority report which vigorously opposed the enactment of the Miller-Tydings Amendment laid particular emphasis on its applicability to non-signers. In that report, Senator King frequently adverted to the non-signer provisions of the fair trade acts. For example, it states (Ibid. Pt. 2, 6):

> And it should not be forgotten that these price contracts are not necessarily made with each wholesaler

> or retailer who resells the goods. The Supreme Court has always [sic] held valid, in the California and Illinois cases, the section in these State laws that allows the manufacturer or the wholesaler by having only one contract in a State to force his fixed price on other dealers within the State by merely giving such other dealers notices of the contract.

These references take on added significance in the light of the correspondence between the President and the Federal Trade Commission which is set out in full in the minority report. The recommendation of the Federal Trade Commission given in response to the President's request was extremely critical of the Miller-Tydings Amendment and emphasized as a basis for the rejection of the legislation, its applicability to non-signers (Ibid. 3):

> The Tydings-Miller bill would amend the antitrust laws so as to legalize contracts and agreements fixing minimum resale prices for goods sold in interstate commerce and resold within the jurisdiction of any State where such contracts or agreements as to intrastate commerce have been legalized. A number of States now have such statutes.
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> A peculiar feature of many of the State laws which would, under a recent decision of the Supreme Court, speaking through Mr. Justice Sutherland (57 S. Ct. 147), thus be made binding upon interstate commerce is that they require wholesalers and retailers to conform to the provisions of private resale price maintenance contracts to which they are not parties. Thus, a private contract, the provisions of which are determined without public hearing and apart from any public supervision as to reasonableness, is made binding upon all dealers and the consuming public.

This recommendation is probably the most clarifying single item of historical data, and can in no way be minimized for it serves to reflect not only the general understanding of the legislators, but also the contemporaneous

interpretation of an administrative agency which was directly and vitally concerned with the application and scope of the legislation.

It is highly significant that in all the legislative history of the Amendment, the reports of the Committees, the hearings, and, as will appear, the debates on the floor of Congress, it was never once suggested that the Amendment did not apply to non-signers; it was never once suggested that the scope of the Amendment was limited to the effectuation of only a minute segment of State fair trade policy. The opponents of the Amendment, who based their attack upon the premise that the legislation was applicable to non-signers, were never once answered with the charge that their premise was erroneous. The answer consistently given by the proponents of the legislation was that its purpose was simply to effectuate the policy of the States; and it was thus that Senator Tydings expressed the position of the sponsors of the legislation when he stated: (81 Cong. Rec. 9700)

> What we have attempted to do is what 42 States have already written on their statute books. It is simply to back up those acts, that is all.

While the debates contain abundant evidence that the purpose of Congress was to give free play to State fair trade acts and that the legislation was intended to apply to non-signers,[4] the most striking declaration of this purpose

[4] The legislative history of the Miller-Tydings Amendment is replete with additional evidence that the purpose of the legislation was to remove every barrier to the free operation of the State fair trade acts. See, for example, the additional statements of Mr. McLaughlin on the floor of the House (81 Cong. Rec. 10425) to the effect that the Amendment "enables fair trade legislation passed by individual State legislatures to become effective and to be fully operative within the respective States." See statement of Representative Dirksen (81 Cong. Rec. 8138) to the effect that the legislation was "an enabling Act which placed the stamp of approval upon price maintenance transactions under State acts, notwithstanding the Sherman Act of 1890." See also statement of Senator Austin (81 Cong. Rec. 7497), and statement of Senator King (81 Cong. Rec. 7491).

on the floor of Congress is contained in the statement of Mr. McLaughlin urging the adoption of the Conference Report (81 Cong. Rec. 10425). After pointing out that the State fair trade acts "practically uniformly provide that any retailer . . . is bound by that contract although he may not be a party to it . . ." he specifically answered the objections which had been levied against the Amendment. The first objection, Mr. McLaughlin stated, was that it would, if enacted, "impose a penalty upon a seller of merchandise for selling such merchandise below the minimum price agreed upon in a contract to which he is not a party." Significantly, Mr. McLaughlin did not deny the premise but rather acknowledged the correctness of the interpretation and answered the objections as follows (Ibid. 10427):

> The first objection, namely, that H.R. 1611, if enacted, will permit resale contracts to be binding upon parties other than the parties to the contract itself, is fully answered by the statement that the respective State laws make provision that the contract shall be binding upon all those who sell the trade-marked article which is the subject of the resale contract whenever the person selling the article below the contract resale price does so willfully and knowingly. This argument is well answered by the controlling opinion of the Supreme Court of the United States in the case of Old Dearborn against Seagram, supra, upholding the validity and constitutionality of the Illinois State Fair Trade Practice Act. . . .
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> Further complete answer to this objection is that the respective States in the exercise of their wisdom and judgment imposed the penalties provided in the respective State acts. The bill before us today, if enacted, merely makes effective the law which has been enacted by the respective State legislatures to govern transactions within their own borders.

The legislative history of the amendment is so unambiguous and conclusive that the adoption of the interpretation proposed by the petitioners would constitute a disregard

of the legislative will.[5] Rarely is the legislative history of a statute so demonstrative. While the legislative history contains innumerable references indicating that Congress understood the Miller-Tydings Amendment to validate non-signer provisions, there has not been discovered a single specific reference to a desire on the part of Congress to exclude such provisions from the scope of the Amendment. While the history is permeated with references to the legislative design to support and effectuate the policy of State fair trade acts, no specific reference can be found to an intention to validate only an ineffectual portion of that local policy.

The conclusive nature of the legislative history has been recognized in one of the few articles dealing with the question in any detailed manner. (16 N.Y.U.L.Q. 114) In concluding "that there is no real basis for . . . limiting the

[5] The conclusive nature of the legislative history is indicated by the weakness of the statements relied upon by the petitioners. They have been unable to adduce any significant comment, which when subjected to careful scrutiny and considered in context fails to support the interpretation demonstrated here. A large portion of the petitioners' argument on legislative history is devoted to a discussion of the *Dr. Miles* case (220 U. S. 373) from which they proceed to the unproven assertion that the only reason for the passage of the Miller-Tydings Amendment was to nullify the ruling in that case. The petitioners' repeated references to the legislative history of earlier bills of somewhat similar context, which Congress failed to enact, is of little assistance in determining the purpose of Congress in passing this legislation. Nor is it true that House Report No. 382 makes only passing reference to the non-signer provisions of the fair trade act. The petitioners also rely upon general and inconclusive statements which are isolated from the context. For example, the petitioners' reliance upon a single general comment of Mr. McLaughlin is hardly justified in view of the very clear exposition which Mr. McLaughlin gave of his understanding of the Bill and of the purpose of Congress in passing it. Finally, the deletion of the words "or other conditions" and the inclusion of prohibitions against horizontal price-fixing hardly seem to warrant the emphasis placed upon them by petitioners since they can in no conceivable way bear upon the applicability of the Miller-Tydings Amendment to non-signers.

sphere of the applicability of . . . the Federal Act," the author made the following observation:

> The legislative history of the Miller-Tydings Bill fully supports the conclusion that Congress intended to give the states a free hand to enforce their programs and had no intention of retaining the sole jurisdiction over non-contracting dealers who are engaged in interstate commerce. The Federal Bill, sometimes referred to as an enabling act, was passed with full knowledge of the nature and extent of the duty to observe prices imposed by the State Acts and with the very purpose of imposing an analogous duty upon those engaged in interstate commerce. In the hearings before the House Committee and in the debates upon the bill in the committee, objection was made to imposing a duty upon non-contracting dealers but the objections were overruled by the committee after full discussion.

It is unnecessary to argue at length the propriety of reference to historical materials, since this Court, in recognition of the dominance of legislative intention as a factor in statutory construction and the futility of isolating words from historical context, has consistently denied the existence of a rule of law which would preclude resort to legislative history, "however clear the words may appear on 'superficial examination.'" *United States* v. *American Trucking Associations*, 310 U. S. 534, 544. See also *Harrison* v. *Northern Trust Co.*, 317 U. S. 476; *Mitchell* v. *Cohen*, 333 U. S. 411; *Gregory* v. *Helvering*, 293 U. S. 465; *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *Armstrong* v. *Nu-Enamel Corp.*, 305 U. S. 315; *Vermilya Brown Co.* v. *Connell*, 335 U. S. 377. Thus, even were it true that the language of the Amendment were superficially inconsistent with the position here taken—and the invalidity of this assumption will be demonstrated later—it would not only be appropriate but would indeed be essential to consider, in addition to the words of the statute, "the context, the purposes of the law, and the circumstances under which the

words were employed" *Vermilya Brown Co.* v. *Connell, supra,* 386. While rules of construction of equal authority will often point in opposite directions, it is certainly safe to assert that the principle of literalness can never be utilized to produce a judicial result which is in obvious and open conflict with the legislative intention. See *Ozawa* v. *United States,* 260 U. S. 178; *Williams* v. *United States,* 289 U. S. 553; *Popovici* v. *Agler,* 280 U. S. 379; *Helvering* v. *Morgan,* 293 U. S. 121; *Fleischmann C. Co.* v. *United States to the use of Forsberg,* 270 U. S. 349; *Shapiro* v. *U. S.,* 335 U. S. 1.

Inquiry into legislative purpose may admittedly in some instances involve the danger "that the Court's conclusion as to legislative purpose will be unconsciously influenced by the judge's own views . . ." *United States* v. *American Trucking Association, supra,* p. 544. However, such danger is not even potentially present when the purpose of the legislative body is so conclusively established as it is here. Indeed, the only danger that might conceivably exist in a case of this nature would be the use of judicial process to subvert a legislative policy of doubtful wisdom by adherence to the dogma of literal interpretation.

2. The Court has continuously applied the principle that a statute should be interpreted in a manner which will preserve rather than nullify its usefulness. Yet, despite their protestations to the contrary, it is apparent that the petitioners request an emasculating construction of the Amendment on the basis of an asserted lack of legislative wisdom. The petitioners have suggested to this Court that the Amendment is "inflationary" (Br. p. 12), that it was "foistered" on the public under the name "fair trade" (Ibid. 30), that it has been used as a "blackjack" (Ibid. 32), and that it has been consistently subject to attack as antagonistic to the welfare of the public by the Department of Justice, the Federal Trade Commission and the Temporary National Economic Committee (Ibid. 30-31). In the petitioners' view, the solution to these problems would be to in-

terpret rather than legislate the life out of the statute; and there is no question that they were entirely correct in their assertion to the Court of Appeals that a decision adopting their construction of the statute would cripple, if not kill, the Amendment[6] (Br. C. A. p. 6). As was observed in 16 N.Y.U.L.Q., *supra*, p. 114:

> . . . if . . . the provision of the state Fair Trade Acts binding non-contracting dealers is restricted to intrastate business, the combined State and Federal legislation will, in the bulk of transactions, afford but scanty protection to the owner of the good will.
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> Furthermore, some courts have indicated that a dealer who is bound to maintain prices will be released from his duty where the owner of the good will fails or is unable to take action against competing dealers in the same product who are cutting prices. In this manner, the freedom of non-contracting dealers in a given product to cut prices as they please in interstate commerce, will ultimately release competing intrastate dealers in the same product (even contracting dealers) from their obligation to maintain resale prices. In the light of these considerations, it is apparent that little, if anything, would remain of the whole protective structure of the resale price maintenance legislation.

As we have shown, according to the House Report, the purpose of the legislation was to "effectuate a public policy so fixed in a State" and, according to the Senate Report, the legislation was enacted on the theory that Congress "should not put obstacles in the way of efforts of the indi-

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[6] See 51 Harv. L. Rev. 344, which states the problem as follows: "It has been suggested that the Miller-Tydings Act further limits the seller, and gives him legal recourse only against a contractually bound price-cutter, since it refers only to the legalization of the price maintenance contracts themselves, and unlike most state legislation fails expressly to mention price-cutting by those not parties to the contract. Since price maintenance is extremely difficult unless noncontractors with knowledge of the price restrictions are bound, this strict construction of the Act would greatly impair its usefulness."

vidual states to make the remedy effective." According to Senator Tydings, the purpose was "to back up those (the State) Acts." According to Mr. McLaughlin, the purpose was to enable the fair trade legislation of the individual states "to become effective and to be fully operative." According to Representative Dirksen, the purpose was to put "the stamp of approval upon price maintenance transactions under State Acts." According to Senator Austin, the purpose was to "preserve . . . their (the States) right to manage their own affairs . . ."

If the Amendment is now interpreted in the frustrating manner petitioners suggest, then the judicial function will not have been applied in accordance with the principle laid down by the Court that "every reasonable presumption attaches to the proscription to require the courts to make it [the legislation] effective in accord with the evident purpose" *United States* v. *Evans*, 333 U. S. 483, 486. Perhaps one of the best expositions of the process of statutory construction in a context such as this, is set forth in *Markham* v. *Cabell*, 326 U. S. 404, where the Court refused to read Section 9(e) of the Trading with the Enemy Act literally "without regard to its history." After pointing out that "the policy as well as the letter of the law is a guide to decision," the Court made the following observation (p. 409):

> "The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve."

Whether the Miller-Tydings Amendment is or is not inflationary; whether or not it was "foistered" on the public or "smuggled" into the law; whether or not it has been the subject of uniform criticism by the Department of Justice and other agencies of the Federal Government; the Amendment must be interpreted "in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen"; and "the 'plain meaning' rule [must] give way where its application would produce a

futile result . . ." *Shapiro* v. *United States*, 335 U. S. 1, 31. See also *Armstrong Paint & Varnish Works* v. *Nu-Enamel, supra; Markham* v. *Cabell, supra; Haggar Co.* v. *Helvering*, 308 U. S. 389.

3. The language of the Miller-Tydings Amendment, even when literally construed, is consistent with the position of the respondents. While the Amendment removes from the scope of the Sherman Act "contracts or agreements describing minimum prices . . .", it does not purport to limit the scope of the Amendment to transactions involving those who actually sign minimum resale price agreements, nor does it purport to be inapplicable to those retailers who become bound by such agreements by virtue of the purchase of a commodity with notice of the fair trade restriction. The entire argument of the petitioners ignores the historical fact that, at the time the Amendment was enacted, non-signing retailers were considered to be bound by, and in substance parties to, minimum resale price contracts when they purchased branded commodities with notice of such a contract. The very theory upon which the non-signer provisions of State fair trade acts have been upheld is that a non-signing retailer, by contracting to purchase a commodity with knowledge of an existing minimum resale price agreement, assents to the price restriction which then becomes a part and indeed a condition of the non-signer's contract of purchase. Thus, in the case of *Old Dearborn Distilling Co.* v. *Seagram-Distillers Corporation*, 299 U. S. 183, the Court in sustaining the constitutionality of the Illinois Fair Trade Act, after pointing out that it was not concerned with one who had "made his purchase in ignorance of the *contractual restrictions* upon the selling price" made the following observation (p. 193):

> Appellants here acquired the commodity in question with full knowledge of the then existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and

> their voluntary acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, *assent to the protective restriction* with consequent liability under section 2 of the law by which such acquisition was conditioned.

See also, *Eli Lilly & Company* v. *Saunders*, 216 N. C. 163, 4 S. E. 2d 528, 125 ALR 1308, where the Supreme Court of North Carolina in sustaining the non-signer provisions of the North Carolina Fair Trade Practices Act, made the following statement:

> If the law itself is valid, and we hold it to be so, it is a public statute which the defendant was bound to have in contemplation when he made the purchase.

Entirely apart from the question whether as a matter of law a contractual obligation can be said to exist in the case of a non-signer, it is certainly clear that such was the premise on which the Congress acted in passing the Amendment which excluded certain "contracts or agreements" from the prohibitions of the Sherman Act. For example, the House Report contains the following statement in its description of a typical State fair trade act (H. Rep. 382, p. 2):

> Second, that third parties with notice are bound by the terms of such a contract regardless of whether they are parties to it.

The statement of Representatives Celler and Ramsay which has been set out earlier, proceeds on the theory that the price-fixing contracts themselves are "binding on all (on notice as to their existence)." The Federal Trade Commission recommendation was based on the premise that non-signing retailers were compelled to conform to the provisions of minimum resale price contracts and were bound by such contracts in the same manner as those who signed them. In fact, an analysis of the legislative history referred to earlier in this brief will reveal a Congressional

understanding that non-signers with notice were as much bound by minimum resale price agreements as those who actually signed such agreements.

It is significant that, in almost every instance in which the liability of non-signers with notice was referred to in the legislative history of the Miller-Tydings Amendment, it was cast in terms of an obligation under the contract. Any argument, therefore, to the effect that the exemption of "contracts or agreements" is inapplicable to non-signers, misconceives an essential premise of the legislation, namely, that non-signers who purchased branded commodities with notice of an existing minimum resale price contract assented and agreed to the price restriction as a part of the transaction of purchase, and were, therefore, thus bound to a minimum resale price contract in the same manner as if they had signed such a contract.

Actually, the authorities upon which the petitioners rely support the position that a contractual relationship was considered by Congress to have existed in the case of non-signers. Thus, Shulman, writing on *The Fair Trade Acts*, 49 Yale L. Jour. 607, 618, makes the following statement with reference to the liability of non-signers:

> The old resale price maintenance rested entirely on contract and the producer's power to refuse to sell to those who would not comply. *The Fair Trade Acts pretend to be also based on contract.* So the Supreme Court and Mr. Rogers point out that the Acts merely permit the parties to a sale to make a voluntary agreement as to resale prices if they so desire. But isn't that completely fanciful? A single contract between the manufacturer and a single retailer, if brought to the attention of the entire trade, is sufficient to bind the entire trade.

While it is true that Shulman states that the contract theory is "fanciful" and contends that in reality it is notice of the fixed price which is the basis of the fair trade acts, the significant fact is that the non-signer provisions of the fair trade acts purport to be based on contract and Congress so

understood when it enacted the Miller-Tydings Amendment.

As a matter of fact, there is nothing fanciful about the theory which formed the basis of the *Old Dearborn* decision. That laws which are in effect at the time and place of making a contract, such as a contract of purchase, are as much a part of a contract as if they were expressly incorporated therein is a basic principle. It may be found in innumerable State decisions and has been relied upon by this Court and the Courts of Appeals. In *Wood* v. *Lovett*, 313 U. S. 362, 370, the Court held that laws which existed at the time and place when the contract was made "enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." In that case, the Court held that the terms of a statute which accorded rights and immunities to a vendee became part of the obligation of a quit claim deed despite the fact that the statute was later repealed. The Court further held that the repealing statute could not be construed as removing the terms incorporated into the deed by the prior statute without an unlawful impairment of contract. See also *Farmers & Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649; *Home Building & L. Assn.* v. *Blaisdell*, 290 U. S. 398.

The relatively recent decision of the Court of Appeals for the Second Circuit, in *Bataglia, et al* v. *General Motors Corp.*, 169 F. 2d 254, was largely predicated on the theory that employment contracts were modified so as to include "judicially established law" despite the fact that the contracts were entered into prior to the judicial declarations; and the observation of the Court in this respect is significant (p. 258):

> At the same time, if it can be said that the contracts of employment were modified upon the enactment of the Fair Labor Standards Act, perhaps it also can be said that when those decisions were made, the contracts of employment were again modified so as to take the judicially established law into consideration. *Were this the case, even if the rights of the employees were*

purely statutory up to the time of those decisions, thereafter they were based upon contract."

See also *Roland Electrical Co.* v. *Black*, (C. A. 4) 163 F. 2d, 417, 426.

It is submitted therefore that the substantive law of the State of Louisiana becomes a part of the contract of purchase entered into by each non-signing retailer. Admittedly, such a contract incorporating the minimum resale price restrictions would, as applied to interstate commerce, violate the Sherman Act were it not for the Miller-Tydings Amendment; but this would also be the case with respect to a contract which by its own terms incorporated minimum resale price restrictions. In either instance the Miller-Tydings Amendment removes "the contract or agreement" from the scope of the anti-trust laws.

At any rate, it is entirely irrelevant whether an action against a non-signer sounds technically in tort or in contract or whether it is based upon the doctrine of equitable servitude. While the subject matter of the Amendment is the contract or agreement, even a cursory analysis of the legislative history demonstrates that the Congress considered non-signers to be as firmly bound to a minimum resale price contract of which they had notice as the signer; and the words "contract or agreement" were utilized in that context. In enacting the Amendment, Congress acted on the premise that such agreements were equally operative against signers and non-signers, and having thus validated the contracts, permitted their operative effect to be determined under State law.

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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